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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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09/156,952    09/18/98    OSTGAARD

R    CYM-025

021323  
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IM62/0121

EXAMINER

BEX, P

ART UNIT

PAPER NUMBER

1743

DATE MAILED:

01/21/00

**Please find below and/or attached an Office communication concerning this application or proceeding.**

**Commissioner of Patents and Trademarks**

# Office Action Summary

Application No.

09/156,952

Applicant(s)

Ostgaard et al.

Examiner

Patricia Kathryn Bex

Group Art Unit

1743



☒ Responsive to communication(s) filed on Oct 12, 1999

☐ This action is **FINAL**.

☐ Since this application is in condition for allowance except for formal matters, **prosecution as to the merits is closed** in accordance with the practice under *Ex parte Quayle*, 35 C.D. 11; 453 O.G. 213.

A shortened statutory period for response to this action is set to expire 3 month(s), or thirty days, whichever is longer, from the mailing date of this communication. Failure to respond within the period for response will cause the application to become abandoned. (35 U.S.C. § 133). Extensions of time may be obtained under the provisions of 37 CFR 1.136(a).

## Disposition of Claim

☒ Claim(s) 1-25 is/are pending in the application

Of the above, claim(s) \_\_\_\_\_ is/are withdrawn from consideration

☐ Claim(s) \_\_\_\_\_ is/are allowed.

☒ Claim(s) 1-25 is/are rejected.

☐ Claim(s) \_\_\_\_\_ is/are objected to.

☐ Claims \_\_\_\_\_ are subject to restriction or election requirement.

## Application Papers

☒ See the attached Notice of Draftsperson's Patent Drawing Review, PTO-948.

☐ The drawing(s) filed on \_\_\_\_\_ is/are objected to by the Examiner.

☐ The proposed drawing correction, filed on \_\_\_\_\_ is ☐ approved ☐ disapproved.

☐ The specification is objected to by the Examiner.

☐ The oath or declaration is objected to by the Examiner.

## Priority under 35 U.S.C. § 119

☐ Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

☐ All ☐ Some\* ☒ None of the CERTIFIED copies of the priority documents have been

☐ received.

☐ received in Application No. (Series Code/Serial Number) \_\_\_\_\_

☐ received in this national stage application from the International Bureau (PCT Rule 17.2(a)).

\*Certified copies not received: \_\_\_\_\_

☐ Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

## Attachment(s)

☒ Notice of References Cited, PTO-892

☒ Information Disclosure Statement(s), PTO-1449, Paper No(s). 5

☐ Interview Summary, PTO-413

☒ Notice of Draftsperson's Patent Drawing Review, PTO-948

☐ Notice of Informal Patent Application, PTO-152

— SEE OFFICE ACTION ON THE FOLLOWING PAGES —

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## DETAILED ACTION

### *Claim Rejections - 35 USC § 112*

1. The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

2. Claims 1-25 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

The term "generally" in claims 1, 9-10 and 15 is a relative term which renders the claim indefinite. The term "generally" is not defined by the claim, the specification does not provide a standard for ascertaining the requisite degree, and one of ordinary skill in the art would not be reasonably apprised of the scope of the invention. The term "generally" renders the outer surface and the radially disposed rib indefinite.

### *Claim Rejections - 35 USC § 102*

3. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless --

(b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

4. Claims 1, 9 and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Warder et al. (USP 4,872,563).

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Warder et al. teaches a sample vial (10, Fig. 1) comprising a body (12, Fig. 1) having a cylindrical outer surface, an open end, a closed end, and at least one lug (26, Fig 1) about the body outer surface; a cap (14, Fig.1) releasably engagable with the body, and the cap comprising an outer surface and a torque pattern (44, Fig. 1) on the cap outer surface; and a seal (38, Fig. 1) disposed between the body and the cap so as to be capable of forming a substantially fluid-tight seal therebetween (column 2 lines 50-54).

5. Claims 1-2, 4, 9-12, and 14 are rejected under 35 U.S.C. 102(b) as being anticipated by Wiedmann (Des. 244,555).

Wiedmann teaches a test tube (Fig. 1) comprising a body (Fig. 1) having a cylindrical outer surface, an open end, a closed end, and at least one lug ( Fig 1) about the body outer surface; a cap ( Fig.3) releasably engagable with the body, and the cap comprising an outer surface and a torque pattern ( Fig. 3) on the cap outer surface. It is inherent in the reference that Wiedmann teaches a vial in which a seal is disposed between the body and the cap so as to be capable of forming a substantially fluid-tight seal therebetween to prevent the vial from leaking.

***Claim Rejections - 35 USC § 103***

6. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

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7. The factual inquiries set forth in *Graham v. John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

8. Claims 3<sup>3-4</sup>, 13, 15-18, 21-25 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wiedmann (Des. 244,555) in view of Jensen et al. (USP 4,917,867).

In reference to claim 15, Wiedmann as discussed above does not teach a test tube wherein the body further comprises fluid level indicia disposed on the cylindrical outer surface thereof. Jensen does teach a container (28, Fig.1) wherein the body further comprises fluid level indicia (56, Fig. 8) disposed on the cylindrical outer surface thereof, the fluid level indicia comprising an upper and lower fill lines (column 4 lines 30-35). It would have been obvious at the time of the invention to have included in the vial of Wiedmann the fluid level indicia as taught by Jensen, in order to make sure that the amount of liquid obtained will be enough for analysis and how much liquid will be too much, and thereby wasteful.

9. Claims 19-20 are rejected under 35 U.S.C. 103(a) as being unpatentable over Wiedmann (Des. 244,555) in view of Cytoc Corporation, *ThinPrep 2000 Operator's Manual* (1995).

Wiedmann as discussed above does not teach a test tube wherein the cap comprises a first alignment marker and the body comprises a second alignment marker, wherein the first and

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second alignment markers indicate a fluid-tight seal when at least aligned. Cytoc Corporation does teach a container wherein the cap comprises a first alignment marker and the body comprises a second alignment marker (Fig. 3-13), wherein the first and second alignment markers indicate a fluid-tight seal when at least aligned (page 3.19). It would have been obvious at the time of the invention to have included in the test tube of Wiedmann the first and second alignment markers of Cytoc Corporation, in order to assure that the cap and the test tube were properly sealed as to avoid any spillage of the contents of the test tube and thereby reducing the possibility of contamination.

### *Conclusion*

10. Claims 1-25 are rejected.

11. References: Curtis, Neeley et al., North, Floyd, Burns ('111), Burns ('170), Asher, Elliott, Lewis, and Ikeda et al. are cited as art of interest for the teachings of a sample vial comprising a body comprising a cylindrical outer surface, an open end, a closed end, and a cap releasably engagable with the body and a seal disposed between the body and the cap.

12. Any inquiry concerning this communication or earlier communications from the examiner should be directed to Patricia Kathryn Bex whose telephone number is (703) 306-5697.

The fax number for the organization where this application or proceeding is assigned is (703) 305-7718 for official papers prior to mailing of a Final Office Action. For official papers after mailing of a Final Office Action, use fax number (703) 305-3599. For unofficial or draft

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papers use fax number (703) 305-7719. Please label all faxes as official or unofficial. The above fax numbers will allow the paper to be forwarded to the examiner in a timely manner.

Any inquiry of a general nature or relating to the status of this application should be directed to the Group receptionist whose telephone number is (703) 308-0661.



Patricia K. Bex  
Patent Examiner  
AU 1743  
January 13, 2000



LONG V. LE  
PRIMARY EXAMINER

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